IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2408 OF 2004

Paresh Jayantilal Khandwala ...Petitioner

Versus

State of Maharashtra & Anr. ...Respondents

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Mr. Viveka Kantawala i/b M/s. Kantawala & Co. for Petitioner

Mr. A.H.H. Ponda, advocate for Respondent No.2.

Mr. D.P Adsule, A.P.P. for State.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATED: 8TH JUNE, 2005

P. C.:-

1. Heard both sides.

2. The petitioner is seeking quashing of process issued against him under Section 138 of the Negotiable Instruments Act in Criminal Case No. 3582 of 2002 pending before the Judicial Magistrate, First Class, at Vasai.

3. The petitioner is hereby challenging the order of Magistrate issuing process. However, in my opinion, the petitioner has an efficacious alternate remedy i.e. of preferring a revision before the Sessions Court against the order of the Magistrate issuing

process. Hence, I expressed the view that it would be more appropriate that the petitioner prefers revision before the concerned Sessions Court against the order of the Magistrate issuing process.

4. On expressing this opinion, the learned advocate for the petitioner has pointed out the recent decision of the Supreme Court in the case of Adalat Prasad (supra). The learned advocate has submitted that in the said decision, wherein it is observed in para 16 that in a case where process has been issued, in the absence of any review power or inherent power with the subordinate criminal Courts, the remedy lies in invoking Section 482 of Criminal Procedure Code. Thus the learned advocate has submitted that in view of the observations of the Supreme Court, the petitioner has rightly approached the High Court for relief as both the lower Courts i.e. the Magistrate or Sessions Court cannot grant the relief.

5. The learned advocate has also placed reliance on another decision of the Supreme Court in the case of **Subramanium Sethuraman Vs. State of Maharashtra & Anr. 2005 (1) Mh.L.J. 626.** The learned advocate has submitted that in the said decision, the Supreme Court has held that in a case where the process is issued the only course available to the aggrieved party is to challenge the issuance of process by way

of petition under Section 482 of the Criminal Procedure Code.

6. I have carefully perused the said decisions. In the case of **Adalat Prasad**, the question which came up for consideration before the Supreme Court was whether the view of the Supreme Court in **K.M.Mathew Vs. State of Kerala and another 1992(1) SCC 217,** wherein it was held that if the Magistrate had issued process, he could also recall such an order, was a correct view or not. Thus, the question which fell for consideration before the Supreme Court in the case of Adalat Prasad was whether a Magistrate could recall process. It was the only question which fell for consideration. It is to be noted that it was the only question argued, deliberated and decided by the Supreme Court. While deciding the case of Adalat Prasad, the Supreme Court was not considering the question whether a revision could be preferred against the order of Magistrate issuing process. In fact, in the case of Adalat Prasad, after the observations in para 16 stated above, in para 18, the Supreme Court has observed thus:

> "18. In view of our above conclusion, it is not necessary for us to go into the question whether order issuing a process amounts to an interim order or not".

. Thus, in the case of Adalat Prasad, the Supreme

Court has not decided the issue whether a revision against such an order is maintainable or not as the said issue was not raised.

7. As far as the decision in the case of **Subramaniam Sethuraman** is concerned, the question which fell for consideration before the Supreme Court was whether the decision in the case of **Adalat Prasad** would require reconsideration as in the case of Adalat Prasad the Court proceeded on the basis that the case was a summons case but in reality it was a warrant case covered by Chapter XIX of the Criminal Procedure Code. That was the question which arose for consideration. Again the issue for consideration before the Supreme Court was whether the "Magistrate" could recall the order issuing process in a summons case as well as warrant case. The Supreme Court held that it would not make any difference whether a case was a summons case or a warrant case and in both the cases the Magistrate did not have the power to recall process. In the case of **Subramanium Sethuraman,** the observations in the case of **Adalat Prasad,** have been quoted and it was held that the fact that it was a warrant case and **K.M.Mathew** pertained to summons case would not make the law laid down in **Adalat Prasad's** case bad law.

8. Thus in both cases, the question which arose for

consideration was whether the "Magistrate" could recall process which was issued by him. The sole question which arose for consideration in the case of **Adalat Prasad** was whether the view in the case of **K.M.Mathew** that the Magistrate could recall process issued by him was correct or not. In the said case, the question did not arise for consideration whether a revision could be preferred before the Sessions Court against the order issuing process. Moreover, in **Adalat Prasad's** case as is clear from para 18, the said question is left open. It is not the ratio of the judgment in **Adalat Prasad's** case that a revision against the order issuing process is not maintainable. It can be said to be the *ratio decidendi* of the judgment if the following requirements are met:

(a) The issue involved must be directly and substantially in issue in the case.

(b) The issue needs to be decided, and

(c) there are reasons given in the judgment while deciding the issue.

. If the judgment in the case of **Adalat Prasad** is considered, it is seen that what was in issue was whether the "Magistrate" could recall the order issuing process. The ratio of the judgment would have to be applied to cases wherein the Magistrate is called upon to recall process and the ratio would not apply to cases where the Sessions Court is called

upon to exercise its revisional jurisdiction in cases where process has been issued.

. The Supreme Court has observed in the case of **Commissioner of Income Tax Vs. Sun Engineering Works (P) Ltd. reported in (1992) 4 SCC 363** as under:

> "...It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the question which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court to support their reasonings. In **Madhav Rao Scindia Vs. Union of India,** this Court cautioned:
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> "It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme court, divorced from its context as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment".

9. In the case of **Adalat Prasad** or **Subramanium Sethuraman**, the question did not arise for consideration as to whether a revision can be preferred against the order of Magistrate issuing process. Hence, the one line in paragraph 16 of Adalat Prasad or even Subramaniaum Sethuraman cannot

be divorced from the context of the question under consideration and treated as complete law declared on the subject that a revision against an order issuing process is not maintainable. It cannot be said to be the ratio of Adalat Prasad that a revision is not maintainable especially also keeping in mind the observations in paragraph 18 of the Adalat Prasad. So also looking to the question under consideration in the case of Subramanian Sethuraman, it cannot be said to be the ratio in the said case that a revision against order issuing process is not maintainable.

10. In the case of **Bhaskar Industries Ltd. Vs. Bhiwani Denim & Apparels Ltd. and anr. reported in 2002(1) Mh.L.J.81,** in relation to the powers of revision, the Supreme Court has observed that the interdict contained in Section 397(2) of the Code of Criminal Procedure is that the powers of revision shall not be exercised in relation to any interlocutory order. Whether an order is interlocutory or not, cannot be decided by merely looking at the order or merely because the order was passed at an interlocutory stage. The Supreme court laid down that the safe test is that if the contention of the Petitioner who moves the superior court in revision, as against the order under challenge, is upheld, would the criminal proceedings as a whole culminate ? If they would, then the order

is not an interlocutory order inspite of the fact that it was passed during any interlocutory stage. In the present case, if the contention of the present petitioner in respect of the order issuing process is upheld the proceedings in the said case would come to an end, hence, in the light of the above decision, the order issuing process cannot be said to be an interlocutory order even though it may have been passed at an interlocutory stage.

11. Moreover, it is pertinent to note that in the case of **Rajendra Kumar Sitaram Pande and others Vs. Uttam and Another (1999) 3 SCC 134,** the main question before the Supreme Court was whether the order of Magistrate directing the issuance of process is an interlocutory order or not. The said question was directly in issue in the said case. The said issue was decided giving detailed reasons. The Supreme Court held after giving detailed reasonings that the order of Magistrate directing issuance of process is not an interlocutory order and the revisional jurisdiction under Section 397 could be exercised against the same. In view of the above observations, it is clear that an aggrieved person against whom process has been issued, can prefer a revision against the order of the Magistrate issuing process. Thus, it is clear that the petitioner can prefer a revision against the order issuing process. In view

of the fact that the petitioner has an efficacious alternate remedy of preferring revision against the order issuing process, I am of the view that it would be appropriate that the petitioner prefers a revision before the concerned Sessions Court against the order issuing process against him.

12. In view of the above, liberty is granted to the petitioner to prefer revision application before the concerned Sessions Court for quashing of the process issued against him. The learned advocate for the petitioner states that the matter is kept before the trial Court on 10.6.2005 and he prayed that the petitioner may be granted exemption from personal appearance before the trial Court on that day. The prayer made by the learned advocate appears to be reasonable, hence, the petitioner is granted exemption from personal appearance before the trial Court on 10.6.2005.

13. On the necessary revision being preferred by the petitioner before the concerned Sessions Court, the concerned Sessions Court shall dispose of the matter on merits after hearing the necessary parties.

14. Criminal writ petition is disposed of.

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